APPENDIX

(1) Judgment and Probation/Commitment Order of United States District Court:

UNITED STATES
DISTRICT COURT
FOR
DISTRICT OF VERMONT

DOCKET No. 81-00060-01

UNITED STATES OF AMERICA

v.

PERRY WEARDON

JUDGMENT AND PROBATION/
COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date - April 13, 1982 with counsel, Leslie C. Pratt.

PLEA

Not Guilty

FINDING AND JUDGMENT

There being a verdict of guilty. Defendant has

been convicted as charged of the offense of Mail Fraud, in violation of 18 USC 1341 (Counts 1-6 and 8-13).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: That the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Counts 1-6, to run concurrently with each other. On Counts 8-13, the defendant is fined the sum of $1,000 on each count, for a total fine of $6,000. With respect to the penalty of imprisonment on Counts 8-13, imposition of sentence is suspended and the defendant placed on five (5) years' probation, to commence upon release from confinement on Counts

1-6, subject to the following special conditions of probation.

SPECIAL CONDITIONS OF PROBATION

1. You are not to engage, either as a principal or as an employee, in any business which involves the use of the U. S. Mails to solicit customers.

2. You are not to engage in any business, either as a principal or as an employee, which involves the sale of herbs or other medicinal substances, without the express approval of your probation officer.

It is further ordered that defendant Perry Weardon is to surrender himself to the institution designated by the Attorney General on May 11, 1982 by 2:00 p.m.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the

conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

(blank)

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

Signed By Chief Judge James S. Holden
Date: April 13, 1982

U. S. District Court
District of Vermont
Filed
April 14, 1:09 PM '82
Clerk: C. A. Burbank, Deputy Clerk

(2) Judgment Order and Informal Opinion of the United States of Appeals:

UNITED STATES COURT
OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of October, one thousand nine hundred and eighty-two.

Present: Honorable Irving R. Kaufman,
Honorable Ellsworth A. Van Graafeiland,
Honorable George C. Pratt,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

PERRY C. WEARDON,
Appellant. 82-1138

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant argues that Judge Holden erred by not granting his motion for judgment of acquittal, on all the mail fraud counts, at the close of the government's case. He asserts that the opinion testimony of the prosecution's expert witness, Dr. McCormack, was insufficient, standing by itself, to sustain a conviction based largely on misrepresentations concerning the herbal products. Contrary to Weardon's argument, however, it is not necessary for the government to show a "universality of scientific belief that advertising representations are wholly insupportable," Reilly v. Pinkus, 338 U.S.

269, 276 (1949), before such testimony will withstand a Rule 29(a) motion. Instead, absent such "universal" belief, the government may use expert opinion testimony to create an inference of fraud, but "the likelihood of such an inference might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified." Id. When other, independent evidence is adduced to demonstrate an intent to defraud, the opinion testimony is perfectly proper, and will be admitted, and sent to the jury, for what it is worth. United States v. Andreadis, 366 F.2d 423, 433 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

2. Substantial evidence of such an intent was presented in this case. Herbal Educational Center was small, understaffed, and understocked --and Weardon himself was unreachable by telephone--during its entire existence. Fictitious names were used, and the jury could reasonably have inferred HEC was never intended to be a legitimate, long-term, reputable

business operation. The government showed that much of the information in the catalogue published by Weardon came, verbatim, from already published sources, despite Weardon's representation that it was, essentially, based on his own personal knowledge. Weardon did not include in the catalogue or on the repackaged herbal products numerous warnings concerning their use. Neither FDA Inspector Maggio nor Jean Palmer a temporary HEC employee, saw any labels in the Weardon home which might have been used to indicate "for external use only" on certain products, although Weardon testified at trial that HEC possessed and used such labels. Representatives of two of Weardon's suppliers, Karen Junnti of Nature's Products and Sidney Rich of Phoenix Labs, both testified: Junnti related Weardon's apparent lack of concern over changes in the composition of herbal formulas (changes never, in any event, reflected in the catalogue), and appellant's remark, when asked whether the units in the formula recipes were by

weight or volume, that it did not matter. Rich, in response to a question posed by Weardon's own counsel, indicated that the ingredients of bee pollen listed in the catalogue were not the same as those in the pollen actually supplied by Phoenix. In sum, the jury could reasonably have concluded, and Judge Holden could have been satisfied, even without reference to McCormack's testimony, that appellant possessed the requisite intent to deceive.

3. McCormack testified at length, as to thirty herbs and thirty-five formulas, and concluded that Weardon's claims, in his catalogue, were unsubstantiated in twenty and thirty-three cases, respectively. He further noted that the dosage escalation schedule recommended in the catalogue was identical for each of sixty formulas, despite differences among them, and no provision was made for adjusting the dosages for children. The jury might reasonably have concluded that this testimony established unsubstantiated claims, undisclosed risks, and illogical

and hazardous dosage schemes, and so decided the catalogue contained numerous false claims. This evidence clearly amounted to falsity sufficient to support a mail fraud conviction.

4. Weardon's reliance on United States v. Baren, 305 F.2d 527, 528 (2d Cir. 1962) is inapposite. Proof that a customer was actually defrauded is necessary only in a mail fraud prosecution when it is clear that the product is capable of performance as advertised. Id. at 528; United States v. Andreadis, supra, 366 F.2d at 431-2.

5. Testimony establishing that customers had ordered products and received neither goods nor a refund was properly admitted. In light of the substantial evidence presented that a fraudulent scheme preexisted the use of the mails (based, primarily, on inferences the jury properly drew from the catalogue itself), any possible confusion between the Vermont state seizure of Weardon's bank accounts and the alleged scheme in this case was minimal.

Further, the jury was permitted to give weight to evidence establishing that Weardon had successfully withdrawn a large sum of money from his Woodville, New Hampshire bank, yet made no effort to recompense consumers.

6. The government's use of the People's Desk Reference was for impeachment and was therefore outside the hearsay rule entirely. Moreover, defense counsel's failure to object to testimony establishing Portland as the place of publication precludes attack on appeal. See United States v. Katz, 601 F.2d 66, 67 (2d Cir. 1979).

7. Appellant's Fifth Amendment argument is without merit. Judge Holden did not reserve decision on the Rule 29(a) motion. Rather, he denied it without prejudice to renewal at the end of the defendant's case. In any event, Weardon failed to demand a decision on the motion, which was his responsibility if he believed it had been denied, and the absence of such a demand amounts to a waiver of

any claim regarding sufficiency of the government's proof. United States v. Rosengarten, 357 F.2d 263, 266 (2d Cir. 1966).

8. The judgment of conviction is affirmed.

/s/ Irving R. Kaufman

/s/Ellsworth A. Van Graafeiland

/s/George C. Pratt, Circuit Judges

United States Court of Appeals
Second Circuit
Filed Oct. 14, 1982
A. Daniel Fusaro, Clerk